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IN THE

Supreme Court of the United States

October Term, 1963.

No. 528.

NORFOLK DREDGING COMPANY a Virginia corporation,
Petitioner,

v.

SYLVESTER LAWRENCE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The memorandum opinion of the District Court denying defendant's motion to dismiss is reported at 194 F. Supp. 484 (E. D. Va. 1961). The opinion of the Court of Appeals for the Fourth Circuit unanimously affirming the judgment of the District Court on the jury verdict in favor of Lawrence is reported at 319 F. 2d 805 (1963).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Where uncontradicted evidence established that a dredge was in navigation, that the plaintiff had been a deck captain on that dredge for over a year, living, eating and sleeping aboard her, that he performed navigational duties and was not employed in the loading, unloading, refitting or repairing of ships, is not the plaintiff a seaman as a matter of law and entitled to sue under the Jones Act, 46 U. S. C. A. § 688?

STATUTES INVOLVED.

The statutes involved are the Jones Act, 46 U. S. C. A. § 688, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 et seq.

STATEMENT OF THE CASE.

Respondent, Sylvester Lawrence, suffered serious personal injuries on September 3, 1957 while in the course of his employment as a member of the crew of a dredge. For several years prior to the accident, Lawrence had served as a deck captain aboard the Dredge "Talcott", a vessel owned and operated by petitioner, Norfolk Dredging Company (Resp. App. 6).* At the time of the accident, the "Talcott" and her auxiliary vessels were in navigable waters in Oregon Inlet off Manteo, North Carolina. While working aboard one of these auxiliary vessels, derrick barge #8, respondent was seriously injured when a 1500-pound anchor fell and landed across his legs (Resp. App. 7-8).

The uncontradicted and undisputed evidence disclosed that at the time of the accident, the "Talcott" was engaged in dredging operations in Oregon Inlet off Manteo, North Carolina. The dredge and its auxiliary vessels, including a derrick barge, an equipment barge, a tug, and other vessels of the flotilla, had arrived in the area the previous day, having sailed down from Norfolk, Virginia (Resp. App. 11-12). The dredge was the largest vessel of the flotilla. It had sleeping accommodations for the crew and the men also ate their meals on the dredge and otherwise lived there when they were not working.

The dredge had no motive power of its own but was towed from place to place by tugs. While underway she was required to and did post navigational lights and in other respects complied with the rules of the road relating to vessels in navigation (Resp. App. 88). In addition, petitioner had permanently enrolled the "Talcott" as a vessel of the United States at the Port of Norfolk, Virginia (Resp. App. 83-87, 119).

* Resp. App. refers to the appendix to brief for appellee, Sylvester Lawrence, filed with the United States Court of Appeals for the Fourth Circuit and made a part of the record before this Honorable Court.

Prior to the accident, respondent had been employed by petitioner for ten or twelve years on various vessels. He started as a deck hand and had been promoted to a deck foreman, or deck captain. He had been aboard the "Talcott" as deck captain for two or three years prior to the accident (Resp. App. 28-29). His various duties included tending the lines of the dredge and the various auxiliary vessels, and the posting of navigational lights (Resp. App. 30-32). He slept and ate aboard the dredge, frequently staying aboard for four to six weeks at a time before going home for a weekend (Resp. App. 33). The dredge did not carry cargo and there was no evidence that respondent had any duties relating to the loading or unloading of cargo, or the repairing or refitting of vessels. The undisputed and uncontradicted evidence was that his duties were strictly those that were traditionally performed by seamen [1]—duties in furtherance of the vessel's enterprise.

1. Captain Stanley E. Livingston, a master mariner of over 40 years experience, testified without contradiction that plaintiff's duties were those which traditionally and historically were performed by seamen (Resp. App. 66-69).

REASONS WHY THE PETITION SHOULD BE DENIED.

In declaring that respondent was a seaman as a matter of law, the trial court in no way usurped the jury's function, but rather properly performed its traditional function of determining the law applicable in the case before it. A review of the record in this case clearly establishes that there is absolutely no basis whatsoever for a finding that respondent fell within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901, et seq. The facts bearing on this point are uncontradicted. While the petition is couched in terms of the right to a jury trial, petitioner actually is proposing that this Court allocate to the jury the *legislative* function of determining what class of workers shall receive compensation and what workers shall be permitted to sue for damages. This is not and never has been the role of the jury under our legal system and is completely contrary to the constitutional division of power between the legislative and judicial branches of the federal government.

It is for Congress, in the exercise of its legislative power, to determine whether a given class of workers shall receive compensation or instead shall be permitted to sue for damages. It is the duty of the courts to interpret this legislative intent in applying the law to individual cases. Where the facts are clear, the court must declare the applicable law on the basis of the evidence which it has heard. It is only when the facts are not clear, or give rise to conflicting inferences, that the jury has a role, and then its *only* duty is to resolve these issues of fact. In the instant case, as we shall demonstrate, the evidence clearly established respondent's status as a seaman; accordingly, there was nothing to submit to the jury on this issue, and the court correctly decided this as a matter of law.

At the time he was injured, respondent was serving *as a member of the crew* of the Dredge "Talcott". The accident occurred on navigable waters (Resp. App. 7-8).

Accordingly, respondent's status as a maritime worker is clear and were it not for the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901 et seq., his right to a Jones Act remedy would not be subject to question. See *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 71 L. Ed. 157 (1926). The Longshoremen's Compensation Act covers injuries "occurring upon the navigable waters of the United States", which would include the instant accident, but excludes from its coverage "members of a crew of a vessel", 33 U. S. C. A. Sec. 903(1), who, instead retain their Jones Act remedy, see *Senko v. LaCrosse Dredging Corp.*, 352 U. S. 370, 1 L. Ed. 2d 404 (1957). Thus, the focal point of inquiry is whether respondent falls within this latter class.

In attempting to reconcile the traditional policy of the maritime law of providing broad protection to maritime workers with the congressional desire, manifested by the longshoremen's compensation act, to provide a different kind of protection to shore based harbor workers, the courts have been confronted with a myriad of factual situations in which the nature of the work performed does not fit precisely within the popular conception of a seaman or a harbor worker. While status as a seaman or harbor worker frequently is referred to as a factual issue, it is clear that the problem actually is one of mixed fact and law, for upon its determination rests the court's right to exercise jurisdiction. A court or jury cannot confer jurisdiction upon itself by determining that an individual is a member of the crew when, under the applicable legal standards he is not; nor is an injured seaman to be denied his civil remedy by a legally unsupportable "factual" determination that he is a harbor worker. Here the plaintiff's rights arise under specific congressional legislation. It is not within the province of the jury to alter the scope of this legislation. The problem is one of statutory interpretation and is primarily a question of law after the relevant facts have been determined.

Because of the varied nature of maritime employment, the status of an individual as either a seaman or longshoreman cannot always be easily resolved. The facts may not be clear, or may give rise to inferences so conflicting that reasonable men may well differ as to whether or not a particular worker is or is not a "member of the crew of a vessel". In such cases, the decision is left to the trier of fact, subject, however, to judicial review to the same extent as any other factual determination. *Senko v. LaCrosse Dredging Co., supra.* When, however, an individual's status as either a harbor worker or crew member is clear, it is the court's right and duty to declare this as a matter of law, just as it is the court's duty to determine the applicable law in any other situation presented to it. This Court has recognized its role, and the role of the lower courts, in this regard and has not hesitated to determine status as a matter of law where the evidence presented a sufficient basis for decision. The leading case is *Norton v. Warner Co.*, 321 U. S. 565, 88 L. Ed. 931 (1944), in which the Court set aside a finding by a compensation commissioner that the claimant was a harbor worker rather than a Jones Act seaman. The Court carefully noted its responsibility for delineating the scope of the two acts:

> "If the award were to stand, there would be brought within the (longshoremen's) Act a group of workers whom we do not believe Congress intended to include. The Senate Report makes it clear that 'the purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen". *These men are mainly employed in loading, unloading, refitting and repairing ships.*' . . . . These are basic rights (referring to the right of seamen to maintenance and cure and a civil action under the maritime law). The maritime unions appearing in the present case maintain that those remedies are indeed superior to the relief

afforded by the Longshoremen's and Harbor Workers' Compensation Act. Whether they are more desirable than a system of compensation is not for us to determine. But where Congress has provided that those basic rights shall not be withheld from a class or classes of maritime employees, *it is our duty on judicial review to respect the command and not permit the exemption to be narrowed whether by administrative construction or otherwise.*" 321 U. S. at 569-571, 88 L. Ed. at 936-937. (Emphasis supplied.)

More recently the Court of Appeals for the Fourth Circuit in *Hill v. Diamond Construction Company*, 311 F. 2d 789 (4th Cir., 1962), reaffirmed the doctrine that status as a seaman may be determined as a matter of law as follows (at p. 793):

> "If a claimant is injured while working aboard a vessel in navigation, any question of his right to resort to the remedy of the Jones Act will frequently turn upon inferences of fact, *but that is not to say that there is a question of fact respecting the Jones Act remedy when the admitted facts leaves no reasonable room for conflicting ultimate inferences.* If a seaman under Articles is injured while performing his duties aboard a fully manned ship in service, there is no preliminary question of fact as to his right to resort to the Jones Act simply because the ship might wish him relegated to some other remedy. Nor is there any such preliminary question of fact if a construction worker on a dock is injured simply because he would like to associate himself with the transient vessel which was temporarily moored there. Similarly, when there is a basis for reasonable difference as to the status of the structure of a vessel in navigation, the ultimate inference may be one of fact, but when there is no such basis, there is no preliminary factual question as

to the applicability of the Jones Act. . . . *There are thus numerous cases in which the court has disposed of the matter upon motion,* for there was no debatable factual question to be resolved.

"The plaintiffs' claim essentially is that because in some cases the questions of the status of the claimant and of the structure in whose service he contends he was engaged have been held to be ones of fact, the assertion of the claim, however, baseless, created a question of fact in every case. A similar contention was made to the Court of Appeals for the Fifth Circuit in Thibodeaux v. J. Ray McDermott & Co. and similarly rejected. *Of course, there is no such doctrine.*" (Emphasis supplied.)

The uncontradicted evidence established that respondent had numerous duties relating to the navigation of the dredge. These duties included tending the lines of the dredge and its auxiliary vessels (Resp. App. 30), seeing that the lights were placed on the various vessels in accordance with the Coast Guard regulations (Resp. App. 31), and checking towing lines (Resp. App. 34). In addition, he had a wide variety of duties directly related to the vessel's dredging activities and was in charge of the floating pipe line which carried off the material sucked up by the dredge. Virtually all this work was performed on the water.

The foregoing list of duties establishes without doubt that respondent's work was not the kind of work which Congress intended to embrace within the coverage of the Longshoremen's and Harbor Workers' Compensation Act. As this Court stated in *Norton v. Warner, supra,* 321 U. S. at 572, 88 L. Ed. at 937:

"We said in the Bassett case that the term 'crew' embraced those 'who are naturally and primarily on

board', the vessel 'to aid in her navigation'. (Citation omitted.) But navigation is not limited to 'putting over the helm'. It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can 'hand, reef and steer'. Judge Hough pointed out in The Buena Ventura, (D. C.) 243 F. 797, 799, that 'everyone is entitled to the privilege of a seaman, who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage.' And see The Minna, (D. C.) 11 F. 759; Disbrow v. The Walsh Brothers, (D. C.) 36 F. 607, 68 (bargemen). We think that 'crew' must have at least as broad a meaning under the Act. For it is plain the amendment exempting a 'master or member of a crew' that ship's company was not brought under the Act. And we are told by the Senate Report as already noted, that the purpose of the legislation was to provide compensation for those who '*are mainly employed in loading, unloading, refitting, and repairing ships.*' S. Rep. No. 973, supra." (Emphasis supplied.)

The italicized portion of the foregoing quote is extremely significant for it is the basis of the decision in *Norton v. Warner*, *supra*, and the cases which followed in the wake of this definitive opinion. The longshoremen's act was intended to cover those men engaged in the loading or unloading of cargo or the repairing or refitting of ships. The claimant in *Norton v. Warner*, *supra*, was not within the coverage of the act because his duties were not the kind that the act was designated to cover. In the instant case, Lawrence, like the claimant in *Norton v. Warner*, *supra*, was not "mainly employed in loading, unloading, refitting or repairing ships." He therefore was not within the coverage of the Congressional legislation, and neither petitioner, nor the court, nor the jury were free to put him there.

Petitioner did not offer any evidence that Lawrence was primarily engaged in the "loading, unloading, refitting or repairing of ships." Instead, petitioner emphasizes that his primary job was to handle pipe lines, that his work sometimes involved the building up of land areas and that he was essentially a laborer. However, none of these factors would justify denying plaintiff his remedy under the Jones Act. On the contrary, they merely serve to emphasize that he was performing the basic duties of a member of the crew of a dredge, a vessel in navigation—duties which are not within the coverage of the Longshoremen's Act because they are not primarily related to the "loading, unloading, refitting, and repairing of ships," and consequently still fall within the scope of the Jones Act. *Norton v. Warner, supra.* A dredge, though stationary while operating to maintain a channel's depth to permit the uninterrupted passage of ships, is facilitating the movement of vessels in commerce and so engaged in navigation in the accomplishment of her work. This aid to navigation has the same legal significance in relation to the Jones Act, as transportation on navigable waters. Consequently, members of the crew of the dredge engaged in furtherance of the vessel's enterprise are seamen beyond the ambit of the Longshoremen's and Harbor Workers' Compensation Act. See *Ellis v. United States*, 206 U. S. 246, 260, 51 L. Ed. 1047, 1054 (1907).

The trial judge's determination that the Jones Act was applicable as a matter of law is supported by ample authority. In *Pariser v. City of New York*, 146 F. 2d 431, 433 (2d Cir., 1945), the Court, speaking through Judge Augustus N. Hand, stated:

> "The defendant further argues that the court lacked jurisdiction of the case because the plaintiff was not a seaman. This contention is wholly without merit. It is well settled that such an employee working on a dredge is a seaman entitled to sue under the Jones Act,

46 U. S. C. A. § 688. Norton v. Warner, 321 U. S. 656, 64 S. Ct. 747; Ellis v. United States, 206 U. S. 246, 259, 27 S. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589."

Simiarly, in the leading case of *Kibadeaux v. Standard Dredging Co.*, 81 F. 2d 670, 673, 674 (5th Cir.), *cert. den.* 299 U. S. 549, 81 L. Ed. 404 (1936), the court, in a factual situation identical with that presented in the instant case, held that the Jones Act was applicable as a matter of law. The Court stated:

> "We think this deckhand, permanently employed on the vessel and quartered there, under duty to aid in navigating her at sea while going from harbor to harbor, or in maneuvering her while at work in a harbor to prevent maritime collisions as well as to accomplish her work, which itself is to facilitate the entry and exit of vessels of commerce, is a seaman. . . . This dredge was a vessel and Kibadeaux a seaman and a member of her crew. An injury to him by the unseaworthiness of the vessel was cognizable in admiralty. Neither the longshoremen's Act nor the state statutes apply."

In *Summerlin v. Massman Construction Co.*, 199 F. 2d 715 (4th Cir., 1952), the Court of Appeals for the Fourth Circuit held, *as a matter of law*, that an employee whose navigational duties were less apparent than that of the respondent was a seaman entitled to sue under the Jones Act. The court stated at page 716:

> "The case cannot be distinguished on this point from that considered by us in Jeffrey v. Henderson Brothers, 4th Cir., 193 F. 2d 589, where employees on a coal cleaning barge which had been libelled by material men, filed wage claims that were held to be prior to the claim of a mortgagee. The barge was furnished with

machinery and equipment for cleaning and screening coal. It was without motive power of its own but had been moved close to the shore on the Monongahela River in West Virginia and kept in place by mooring lines and spuds. The machinery was used to lift coal from refuse piles along the river bank to the barge where it was cleaned and transferred to barges for transportation and sold. The wage claimants were primarily engaged in the coal cleaning operation. Their maritime activities were reduced to a minimum, consisting for the most part in assisting in moving the barge along the shore when necessary and transferring the cleaned coal to other vessels. We held, after reviewing the pertinent authorities, that the employees were seamen employed on a vessel engaged in maritime operations and were therefore entitled to a maritime lien for wages. *The similarity between these facts and those in the pending case needs no comment, and we conclude that the plaintiff's claim falls within the scope of the Jones Act.*" (Emphasis supplied.)

Petitioner's reliance on cases such as *Senko v. LaCrosse Dredging Corp., supra; South Chicago Coal & Dock Company et al. v. Bassett*, 309 U. S. 251, 84 L. Ed. 732 (1940); *Grimes v. Raymond Concrete Tile Co.*, 356 U. S. 252, 2 L. Ed. 2d 737 (1958); and *Butler v. Whiteman*, 356 U. S. 271, 2 L. Ed. 2d 754 (1958), is misplaced. These cases do not hold, as petitioner contends, that it is for the jury to determine whether an injured worker receives compensation or may sue for damages. Rather, they stand for the proposition that if there is any evidence, no matter how slight, that an injured worker may be within the coverage of the Jones Act, then the case must go to the jury. This is because a finding that a man is covered by the Longshoremen's and Harbor Workers' Compensation Act in effect operates to deprive him of his right to trial by jury. So basic and

fundamental is the right to a jury trial *on the merits* of a claim that this Court, in interpreting the provisions of the Longshoremen's and Harbor Workers' Compensation Act has carefully limited its scope to those factual situations which were clearly before Congress at the time of the enactment of the compensation law. Thus, in the case of *Reed v. Yaka*, — U. S. —, 10 L. Ed. 2d 448 (1963), this Court specifically refused to extend the coverage of the compensation act to a factual situation which it was not clear that Congress intended that it should cover. It is for the same reason that this Court in *Norton v. Warner*, *supra*, referred to the legislative history of the Compensation Act and specifically pointed out that it was intended only to cover those men engaged in the loading, unloading, repairing or refitting of ships. To extend the coverage of the Act beyond this limited area would operate to deprive the right to a jury trial to classes of workers whom Congress did not intend to so limit. The right to a jury trial, grounded as it is in the Seventh Amendment to the Constitution, see *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U. S. 355, 359 (1962) is too important to be denied on the basis of supposition or implication. Despite the citation of authorities upholding the right to a jury trial, petitioner is not seeking to preserve the jury trial, but rather is attempting to deprive the instant respondent of his right to a jury trial on the merits of his claim. And in so doing, petitioner is attempting to extend the coverage of the Longshoremen's and Harbor Workers' Compensation Act to a class of workers whom Congress never intended to cover. Petitioner was given every opportunity, both in the trial court and in the Court of Appeals, to demonstrate that respondent was somehow within the coverage of the Compensation Act, but was unable to convince any of the able jurists below that there was even the slightest evidence to support this contention.

CONCLUSION.

The instant petition does not raise any questions that warrant consideration by this Court. Petitioner has been unable to demonstrate any conflict between the instant decision and the views of any other Circuit Court of Appeals, nor, for that matter, has petitioner been able to cite a single case where a dredge worker was held to fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act. Accordingly, for all the above reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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